Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

OPPOSITION OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES TO RTC'S MOTION FOR STAY

Pursuant to Rule 1.45(d) of the Commission's Rules, the Association for Local Telecommunications Services ("ALTS")[1] hereby opposes the motion of the Rural Telephone Coalition ("RTC") for a stay pending judicial review of the Commission's order released August 8, 1996, in the above proceeding. Because RTC also endorses the jurisdictional argument made in other motions for stay (RTC Motion, n. 6), ALTS hereby references its filing of September 4, 1996, opposing that claim.

I. RTC HAS FAILED TO SHOW ANY LIKELIHOOD THAT IT WILL PREVAIL ON THE MERITS OF ITS CLAIMS.

RTC challenges the Commission's interpretation of Section 251(f) concerning the application of Section 251's pro-competitive requirements to smaller and rural incumbent local

[1] ALTS is the national trade association of over thirty facilities-based competitive providers of access and local exchange services.

exchange companies ("ILECs"); the Commission's interpretation that Section 252(a)(1) requires all interconnection agreements be filed for state approval; and its conclusion that Section 252(i) permits non-parties to an approved agreement to order specific provisions. These claims are without merit.

A. The Commission Correctly Interpreted Section 251(f) In Light of Congress' Fundamental Goal of Local Competition.

RTC asserts three specific reasons why it believes it will prevail concerning the Commission's interpretation of Section 251(f): the Commission's asserted creation of a new statutory standard for Section 251(f); the imposition of the burden of proof on a rural or smaller company seeking to create or preserve an exemption; and the asserted absence of any notice in the Interconnection NPRM.

Beyond the legal defects in each of these claims, it is important the Commission recognize that what RTC really wants is to rewrite the statute. According to RTC: "The statute [Section 251(f)] requires a finding of undue economic burden, but would also enable a state to determine that 'efficient competitive entry' would cause an undue burden'" (RTC Motion at 5). This is manifestly false. The Commission spelled out the fundamental goals of the Telecommunications Act of 1996 at the very beginning of its decision (Interconnection Order at ¶ 3):

> "(1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunication markets that are already open to competition, including the long distance services market; and 3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition."

Because universal service will be fully protected by the new Joint Board's recommendation, as adopted by the Commission and implemented by the Commission and states, there is no conceivable situation under the 1996 Act in which a state could "determine that 'efficient competitive entry' would cause an undue burden" (RTC Motion at 5).

What RTC seeks, pure and simple, is protection for its investors from the effects of efficient competition. That is not what Congress intended, and it would doom the customers of rural and smaller ILECs to becoming the last hostages of monopoly telephone provisioning.

1. "Extraordinary Undue Economic Harm"

RTC starts its challenge by building a strawman argument. It claims the Commission "puts on the rural telephone company the burden to show that it will suffer extraordinary undue economic burdens beyond those typically associated with competitive entry (hereafter, the 'extraordinary undue economic burden')" (RTC Motion at 5; emphasis supplied), and then attacks this misportrayal of the Commission's action. The truth is quite different. The Commission expressly declined to adopt national

rules governing all aspects of Section 251(f),[2] and instead concerned itself with Congress' basic intent (Interconnection Order at ¶ 1262):

> "We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry." (Emphasis supplied.)

The Commission's actual interpretation of Section 251(f) -- as opposed to RTC's preposterous "extraordinary economic harm" strawman -- is clearly appropriate. As discussed above, if a smaller or rural company incurs only the economic burdens typically associated with efficient competitive entry, Congress' clear endorsement of local competition in the 1996 Act precludes exempting such a company from Section 251's pro-competitive requirements.

Furthermore, the rules issued in the Commission's Interconnection Order provide full compensation for the costs of interconnection and unbundled network elements, as amply underscored by the fact that the Iowa Utilities Board is

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[2] See Interconnection Order at ¶¶ 1254-55: " ...we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f) ... Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f)."

currently seeking a stay of the rules on the ground that their underlying TELRIC cost standard overcompensates the ILECs (Motion for Stay of Iowa Utilities Board filed September 19, 1996). Inasmuch as RTC's members will recoup the costs of complying with Section 251, their only economic burden will be the potential loss of customers. But gaining and losing market share is the heart and soul of competition. Immunizing RTC's members from market share loss is tantamount to repealing the 1996 Act for the customers of small and rural carriers.[3]

Finally, RTC is plainly wrong in arguing that universal service concerns warrant a more protective interpretation of "not unduly economically burdensome" by states when considering an exemption request (RTC Motion at 12). Congress has made it crystal clear that Section 254 is to be the basic instrument of insuring universal service: "To the extent possible, the conferees intend that any support mechanisms continued or created under new section 254 should be explicit, rather than implicit" (S.Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996)), and Congress expressly referenced Section 254 in both Section 252(f)(1) and 251(f)(2) in addition to imposing the "not unduly economically burdensome" standard.

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[3] RTC also complains that the Commission failed to acknowledge the "technical feasibility" requirement of Section 251(f)(1)(RTC Motion at 5), but never mentions that extensive parts of the Interconnection Order analyze how the same phrase should be interpreted when used in specific paragraphs of Section 251(c). See, e.g., Interconnection Order at ¶¶ 192-206.

In light of Congress' demand for "express" support mechanisms, and its reference in Section 251(f) to Section 254 compliance in addition to the "not unduly economically burdensome" standard, it is clear that state commissions cannot look to universal service concerns to justify a more easily met "economically burdensome" standard for an exemption. Instead, Congress expects state commissions to make sure that Section 254 has been properly implemented in the particular facts of each exemption request, and then to apply the "not unduly economically burdensome" test in the manner explained by the Commission.

2. Imposition of the Burden of Proof

RTC also takes vigorous exception to the Commission's decision to impose the burden of proof upon the small or rural LEC seeking to create or extend an exemption from the requirements of Section 251(c): "The Commission bases its burden of proof rule on the summary conclusion that 'it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirement'" (RTC Motion at 8). But this is not the only basis for the Commission's conclusion. The Interconnection Order expressly points to the logic of imposing the burden of proof on the party "in control of the relevant information necessary for the state to make a determination regarding the request" (Interconnection Order at ¶ 1263). Clearly, it is the smaller and rural LECs which have actual knowledge of any economic harms that might meet the statutory test of Section 251(f), not the CLECs.

3. Lack of Notice

RTC complains that: "The Commission also violated the APA by adopting the 'shifted burden of proof' and 'extraordinary undue economic burden' rules without complying with the notice and comment procedures mandated by section 553 of the APA" (RTC Motion at 10). But the Interconnection NPRM clearly asks: "whether the Commission can and should establish some standards that would assist the states in satisfying their obligations under this section [251(f)]"(at ¶ 261). RTC effectively concedes that the Commission gave adequate notice by acknowledging that two parties "mentioned the idea of a 'shifted burden of proof' in their filings" (RTC Motion at 10).

B. The Commission Correctly Interpreted Section 252(a)(1) and Section 252(i).

It is clear from RTC's Motion for Stay that it vehemently objects to Section 252(a)(1)'s requirement that all interconnection agreements be filed with states for approval (RTC Motion at 15-17). However, RTC's long list of policy differences with Section 252(a)(1)'s filing requirement is entirely misdirected. It is Congress -- not the Commission -- that required the filing of all pre-February 8, 1996, agreements, so RTC's attack on the Commission's implementing regulations is another ill-disguised effort to rewrite the statute.

Similarly, RTC's challenge to Section 252(i)'s requirement that non-parties are entitled to request individual terms from approved agreements is a quarrel with Congress, not the

Commission. And even in the absence of Congress' clear direction in Section 252(i), the Commission would have ample authority to issue the underlying regulations based on other provisions in the 1996 Act. An ILEC's refusal to grant some other CLEC the same individual terms reflected in an existing approved agreement would clearly violate the antidiscrimination language of Section 252(e), as well as the fundamental policy underlying the 1996 Act.

At bottom, Section 252(i)'s requirement that the same interconnection elements be provisioned at the same price to all requesting carriers, aside from any verified cost differences, reflects the same antidiscrimination requirements that ILECs have operated under for over a hundred years. RTC has plainly failed to meet its burden of showing that it will prevail on the merits of this issue.[4]

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[4] RTC tries to contend that the Commission's interpretations of Section 252(a)(1) and 252(i) would also undercut the infrastructure sharing arrangements created by Section 259 of the 1996 Act (RTC Motion at 16, 18). This is plainly incorrect. Section 259 does not even take effect until the Commission issues appropriate rules, it makes no reference to small and rural companies (see Section 259(d), requiring the Commission to define which carriers lack the "economies of scope and scale" to qualify), and it will operate unimpeded by Section 252(a)(1).

Similarly, any infrastructure sharing arrangements already in place are clearly not threatened by the Commission's interpretations. Parties to any such agreements are free to renegotiate those arrangements to make them non-discriminatory, and then submit them for state approval.

II. RTC HAS FAILED TO SHOW THAT IT WOULD BE IRREPARABLY HARMED IF A STAY WERE NOT ISSUED.

RTC does not attempt to show irreparable harm as the term is understood for stay requests. For example, RTC is content to claim that: "The invalid burden of proof and standards requirements substantially increase the probability that the exemption will be terminated. Such unjustified loss of exemption is, by itself, irreparable" (RTC Motion at 11). Whatever RTC means by "unjustified loss," it does not constitute by itself the immediate and irreparable injury required for the issuance of a stay.

RTC goes on to argue that: "Compliance with the rules will require rural telephone companies that are members of the associations to immediately prepare for potential challenges to their exemptions" (RTC Motion at 12). But the courts have long held that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974); Standard Oil v. FPC, 449 U.S. 232, 244 (1980).

III. RTC HAS FAILED TO SHOW ABSENCE OF HARM TO OTHER PARTIES OR THE PUBLIC INTEREST.

Its request for a stay also requires RTC to prove the absence of any harm to CLECs or the public interest. RTC's basic claim on this point is that CLECs just don't need Section 251(c) (RTC Motion at 15):

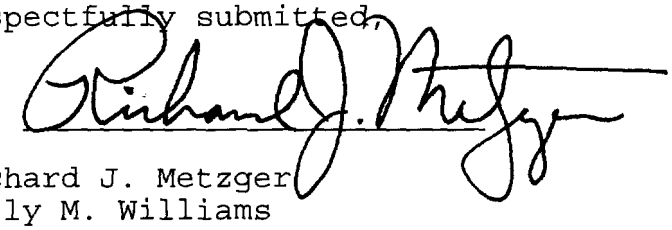
> "Parties interested in competing with a rural telephone company retain their rights to interconnection, resale, number portability, dialing parity, access to rights of way and reciprocal compensation regardless of the section 251(c) exception. They may also reach voluntary agreements under section 251(a) with rural telephone companies to establish interconnection agreements that include provisions that are embraced in section 251(c). These parties thus have other avenues to obtain what access they need from rural telephone companies. Any potential harm they might suffer during the pendency of judicial review is minor in comparison to the harm that the more than 800 individual rural companies and their customers will suffer."

Thus, according to RTC, all the pro-competitive statutory details set forth in Section 251(c) and amplified at length in the Interconnection Order are mere surplusage, and Congress and the Commission could have spent their time on something more important. This is clearly incorrect, and flatly inconsistent with RTC's remarks elsewhere in its stay motion that the Interconnection Order: "explicitly pursues the goal of (a) reducing incumbent LEC bargaining power, (b) narrowing the range of options that may be negotiated, and (c) correcting for the LECs' purported incentives not to negotiate fairly" (RTC Motion at 13). Given RTC's own understanding of the Interconnection Order, RTC has clearly failed to show any lack of harm to CLECs or the public.

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission deny RTC's motion for stay.

Respectfully submitted,

By: 

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Certificate of Service

I hereby certify that the foregoing Opposition of the Association for Local Telecommunications Services to RTC's Motion for Stay was served October 9, 1996, upon the following persons:

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